IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO. 754 OF 2004.

Balu Aburao More : Appellant.

versus

Laxman T. Kamble & Anr. : Respondents.

Mr.P.M.Patel for the appellant.

Mrs.Arati Barve for Respondent NO.2.

CORAM : D.G.DESHPANDE,J.

DATED : 30th August 2005.

ORAL ORDER

1. This appeal is filed by the original claimant against the order dated 7th July 2002 dismissing the claim petition of the claimant. This order was passed by the Commissioner for Workmen's Compensation & Judge, Eleventh Labour Court, Mumbai.

2. It was the case of the claimant that he was in employment of Opponent No.1 Laxman Kamble. He was working as a driver of motor vehicle. An accident took place on 9.4.1998 at Kranal, Kalse village on Mumbai-Goa Road during the course of his employment. He sustained serious injuries He was 26 years of age and was earning salary of Rs.2500/- per month.

3. The injuries sustained by the claimant were fracture right femur, fracture right T-F (both commuted) NDNVD and also sustained other multiple serious injuries. He was hospitalised in Lokmanya Tilak Hospital at Sion, Mumbai. It was his claim that due to said injuries he has lost his 100% loss of earning capacity. Therefore, he claimed Rs.2,58,336/-. He then approached to Opponent No.1 - the owner of the vehicle who refused to pay him and, therefore, he filed the claim petition.

4. Opponent No.1 had denied the existence of relationship of employer - employee or that he was earning Rs.2500/- per month or that the injuries arose out of the employment or duties.

The Insurance Company also denied the liability. The claim petition came to be dismissed on the ground that there was no relationship of employer and employee in between the claimant and opponent No.1. In fact the commissioner committed a grave error in giving negative findings about this aspect of the matter as per Issue No.3. Because though the original owner i.e. Opponent No.1 has initially denied the relationship, he entered the witness box and supported the case of the claimant fully. The commissioner observed that in strict sense of law cannot be regarded as evidence which could be bread in deciding the issue. In fact, the commissioner also came to the conclusion that there was no evidence that the opponent No.1 was the owner of the Trax MH-04/AA/6525. This finding is much beyond the scope when the claimant claims that he was driving a particular vehicle and the owner states that he is the owner of the vehicle and the Insurance Company does not dispute the ownership of the vehicle with Opponent No.1 because the policy of the insurance is for that vehicle only, then this finding is totally perverse.

4. The Commissioner held that neither the

claimant nor the owner produced the policy of the insurance. But the insurance company was very much there opposing and fighting the claim. Nothing prevented the insurance company from filing the policy of insurance and other documents if at all they are disputing the ownership of the vehicle. It is, therefore, clear that the whole case has been considered and decided with totally wrong approach by the commissioner.

5. Counsel for the Insurance Company contended that there was no proof of relationship of employer and employee. But the counsel for the claimant pointed out that the Opponent No.1 examined himself in Court. There was no cross examination of opponent No.1 by the Insurance company. In the paper book submitted by the counsel of the appellant, the notes of evidence are there. Laxman Kamble - the owner is examined and his cross examination by the insurance company is concluded in five questions which is as under :-

> "It is true that the accident took place with the vehicle bearing No.MH-04/AA-6525

> was occurred on 9.4.1998. I had called the driver Balu More to bring my relatives from Chiplun. The vehicle was completely damaged. I had given in writing to the Insurance Co. that my driver has sustained injury, but I am not having a proof to substantiate my this claim. The claim was submitted through my advocate. I can read English. The claim form was submitted on 1.3.2001. It is true that the said form filled in on 1.3.2001 was submitted to the Insurance Co. on 7.6.2002. It is true that I have submitted the claim form after lapse of four years from the date of the accident. It is true that under column 17 of Art. A it was answered "Still undergoing the treatment". It is true that on 1.3.2001 the Driver Balu More was under treatment."

Even this cross examination does not help the Insurance Company at all. It will be, therefore, clear that the trial Court has committed a grave error in dismissing and rejecting the claim petition. The employer-employee relationship

stood proved by the admission of the owner himself and his evidence in court.

6. The written statement of the Insurance company is thereon record. The written statement is short and cryptic. It is in five paras. In the first Para, the applicant was injured during the course of employment as the driver of the aforesaid vehicle, is denied. In 2nd para, earning of the claimant at Rs.2500/- per month is denied. Then in para 3, relation of employer-employee is denied. In para 4, correctness of contents of the residual paras are disputed or denied. And in the last para 5, total disability to the extent of 100% is denied. This is not a written statement at all and, in any case whatever is not pleaded in the written statement cannot be permitted to be argued.

7. In fact all the aspects stood proved by the evidence of the claimant and the owner and also in the absence of any effective cross examination by the Insurance company and as such in these circumstances, the claimant is entitled

to the claim. For these reasons, I pass the following order :-

:ORDER:

The appeal is allowed.

The impugned order of the tribunal is set aside and quashed.

Claimant is awarded compensation of Rs.2,58,336/- with interest at the rate of 12% p.a. from the date of application till deposit or realisation and costs of the appeal.

[D.G.DESHPANDE,J]